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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 23

CHARLES H. STANGE, PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER.

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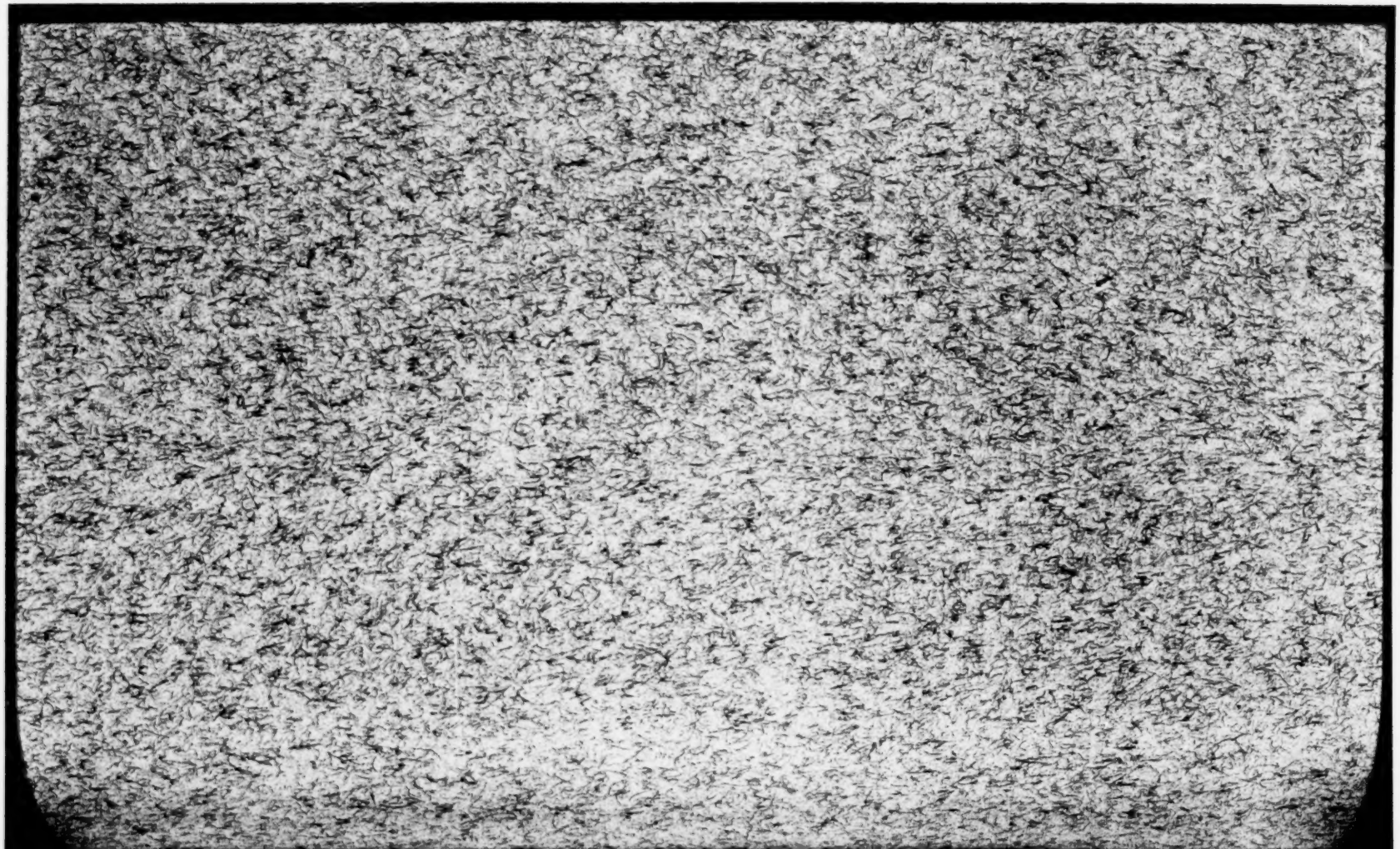


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MAY IT PLEASE THE COURT:

We take the liberty of submitting this supplemental and reply brief (*a*) to refer to certain Court decisions promulgated after our original brief was prepared, (*b*) to reply to certain contentions presented in the brief for respondent, and (*c*) to discuss more in detail one or two points referred to in the original brief.

The errors stated in the assignment of errors will again be discussed in the order of their statement in the original brief for petitioner, page 3.

The italics of this brief, unless otherwise indicated, are ours.

The Court of Claims erred:

In holding that the waiver of November 14, 1922, extended the statutory period for making the additional assessment. It had no such effect because it was not a statutory waiver, i. e., its provisions did not conform to Section 250(d) of the Revenue Act of 1921.

Two rules suggest themselves at the outset of this discussion. The first is clearly stated in the case of Updike *v.* United States, 281 U. S. 489, 496, decided May 19, 1930, in this language:

> "It may be that the saving clause was not strictly necessary, but was inserted from excessive care to put the right of the taxpayer beyond dispute. In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitation embodied therein*, to be construed liberally in favor of the taxpayer. Bowers *v.* N. Y. & Albany Co., 273 U. S. 346, 349."

The second rule is well stated in Howbert *v.* Penrose, 38 Fed. (2d) 577-581 (C. C. A. Tenth Circuit), from which we quote:

> "The question is not free from doubt, but on the whole, we are of the opinion that the sufficiency of the claim for refund was not put in issue, and that the plaintiff is entitled to re-

> cover this tax. The defendant concedes that he is entitled to it on the merits; and while *'men must turn square corners when they deal with the Government'* (*Rock Island, etc., R. Co. v. United States*, 254 *U. S.* 141, 41 *S. Ct.* 55, 56, 65 *L. Ed.* 188) *the government ought to turn square corners when dealing with its citizens.''*

In the case cited by the Circuit Court of Appeals (Rock Island R. R. Co. *v.* United States, 254 U. S. 141) wherein the Court used the expression, "men must turn square corners when they deal with the Government," the question at issue related to the proper construction of Section 3226 of the Revised Statutes as amended. Did that section imperatively require the filing of a refund claim as a condition precedent to suit for an overpayment of taxes, even though the filing of the claim might in some cases be merely an "idle act" or "idle formality"? Your Honors gave effect to the language of the statute saying, in part: "At all events *the words are there in the statute* and the regulations, and the Court is of opinion that they mark the conditions of the claimant's right." So, in the present case the words "determination" and "collection" are in the statute (Section 250(*d*) of the Revenue Act of 1921, 42 Stats. 227-264) and effect should be given to them. In the cited case, also a tax case, compliance with the statutory provisions was required of the party charged thereby. We ask for the application of the same rule here.

Referring to a contention advanced by us in our original brief, counsel for respondent says (Respondent's brief, page 20):

> "This argument is ineffective when it is considered that all waivers given after the enactment of Section 250(*d*) of the Revenue Act of 1921 *supra* are 'statutory waivers' and that the terms of the statute must be considered in connection with every waiver."

And again on the same page of respondent's brief, referring to the Revenue Act of 1921, counsel says:

> "That act did not purport to revive any cause of action which was barred, but provided certain conditions under which the bar first created therein should not apply. The petitioner and the Commissioner of Internal Revenue complied with the conditions therein expressed."

There is here, we respectfully suggest, a misapprehension, unless we are to assume that Section 250(*d*) of the 1921 Act does not mean what it says. To create the power to assess after the expiration of five years from the filing of the return, there must be a written consent to a later *determination, assessment, and collection.* Here, there was at most a consent to a later assessment. Aside from the rule of construction favorable to taxpayers mentioned above and aside from the reciprocal duty of taxpayer and Government to turn square corners in dealing with each other, there was no compliance with the conditions of the excepting clause in the present case. Whether a waiver is a "statutory waiver," even though it be given after the enactment of the 1921 Act, depends upon its provisions. The statute requires a written consent to the per-

formance of three official acts. To say that a written consent to one of those acts is a statutory waiver, is to ignore the plain meaning and effect of the language of the enactment.

In the case of Lucas, Commissioner, *v.* Pilliod Lumber Company, 281 U. S. 245, decided April 14, 1930, it appeared that an unverified income tax return had been filed; and the question presented was whether, in view of the statute requiring verification, that return was sufficient to start the running of the statute of limitations. It was not contended that the return was otherwise insufficient, *e. g.*, that it did not give the Bureau of Internal Revenue all the information needed for a prompt determination of the tax liability. The Court held (page 249):

> "Under the established general rule a statute of limitation runs against the United States only when they assent and upon the conditions prescribed. Here assent that the statute might begin to run was conditioned upon the presentation of a return duly sworn to. *No officer had power to substitute something else for the thing specified.* The return so long as it remained unverified by oath of proper corporate officers did not meet the plain requirements. The necessity for meticulous compliance by the taxpayer with all named conditions in order to secure the benefit of the limitation was distinctly pointed out in Florsheim Bros., etc. *v.* United States, *supra.*"

Is it not a poor rule that does not work both ways? We need go no further than to call attention to the language of the decision itself: "No officer had power

to substitute something else for the thing specified." Here, no officer had power to substitute a waiver consenting to the performance of one official act where the statute specified a consent to the performance of three official acts, each of which is treated separately by the revenue acts, with varying provisions and limitations.

Unless, therefore, we may say that the clause under consideration is directory only, the conclusion is irresistible that the waiver in the present case is not sufficient to revive the power of assessment admittedly lost previously through the lapse of time. But, under the authorities, it cannot be said that any such provision of a taxing act is directory, only. The rule on this subject is stated in the leading case of French *v.* Edwards, 13 Wall. 506, 20 L. Ed. 702, cited with approval in Lyon *v.* Alley, 130 U. S. 184 and in other later decisions; also by Judge Cooley in his work on Taxation. In the French-Edwards case it was held:

> "There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when

> the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

The statute (Section 250(*d*) of the 1921 Act) limits the period for making assessments to five years after the filing of the return, with an excepting clause. The conditions of the exception are stated with care in the enactment: "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax." To revive the power previously lost, there must be a compliance with the plain provisions of this statute.

The Court of Claims erred:

In holding that the waiver of the period of limitation for making an assessment conferred also the power to make collection at any time thereafter. In each of the revenue acts the two powers are separate and distinct. The waiver of the provisions of the revenue acts relating to the assessable period does not confer the power to collect after the expiration of the statutory period for collection.

As pointed out in our original brief, the power to assess and the power to collect are separate and distinct powers, in our scheme of Federal income taxa-

tion. Notwithstanding this fact, the decision of the lower Court would combine the two powers into one. That this may not be done properly will be demonstrated, if we but consider the varying provisions of the several Revenue Acts granting and limiting the power to exercise one or the other of the two powers. It should be kept in mind, we suggest, that we are dealing here with the Federal income tax law, not the taxing act of any of the states whose scheme of taxation may differ widely from that under consideration.

The Board of Tax Appeals was created by Section 900 of the Revenue Act of 1924 (43 Stat. at L. 253-297). That act, as it related to the powers of the Board, was amended by the Revenue Act of 1926 (44 Stat. at L. 9-55). Section 1000 of the later act provides, in part:

> "If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that there is no deficiency in respect of such tax."

If the power to assess *ex proprio vigore* includes the power to collect, why was it necessary for Congress to use the expression, "if the *assessment or collection* of any tax is barred * * *"? In point of fact, there are many cases where the taxpayer has been relieved of liability because the period of collection had expired, although it was conceded that the assessment had been made seasonably. See, for instance, New York & Albany Lighterage Company v.

Bowers, 273 U. S. 347, and Russell *v.* United States, 278 U. S. 181.

An interesting case on this point is that of the United States *v.* Updike, 281 U. S. 489, 496, decided May 19, 1930. In that case it appeared that no return had been filed and, consequently, that the tax could be assessed at any time. The assessment was in fact made in 1920. In 1927 effort was made to collect the tax by suit from the stockholders of the taxpayer, as transferees, under the trust fund doctrine.

In holding that the power to collect was barred, the Court clearly distinguished between the two powers, the power to assess and the power to collect. Indeed, in view of the facts of the case, the conclusion reached by the Court made necessary this differentiation.

In considering the cited case, it should be borne in mind that no return was filed for the taxpayer and, for that reason, the power to assess continued. That power was not barred even at the time of the rendering of the decision of this Court. Nevertheless, the Court held that the power to collect had been lost by inactivity for the statutory period.

Comparing the cited case with the present case, the failure to file a return in the cited case is the equivalent of the giving of the waiver in the present case, *i. e.*, each served to extend the assessable period. In the cited case it was held that even though the assessment had been made within the assessable period as extended, the power to collect was lost if not exercised within the *period for collection.* This conclusion was reached, it may be repeated, at a time when the power to assess was still in force.

In its material aspects, we suggest, the present case is closely analogous to the Updike case; and we respectfully ask for the application to the present case of the rule enunciated therein.

The Court of Claims erred:

In holding valid the waiver of November 14, 1922, given after the expiration of the statutory periods for assessing and collecting the additional taxes here involved. Section 250(d) of the Revenue Act of 1921 contemplates that waivers shall be obtained by the Commissioner of Internal Revenue before the expiration of the statutory periods.

(*a*) In the brief for respondent it is pointed out that taxes for 1915 and earlier years were barred from assessment prior to the passage of the Revenue Act of 1921, and, consequently, the waiver provision of Section 250(*d*) of that act, as applied to taxes for 1915 and earlier years, would be wholly inoperative if limited to cases where the bar had not fallen.

Section 250(*d*) is a general statute fixing the period of limitation not only for assessment but also for collection of taxes thereafter to accrue and also those theretofore accrued under earlier Revenue Acts. The language employed is general and it is perhaps not surprising that some of the provisions of the section may be found inapplicable to a particular case, for one reason or another.

The conclusion of counsel, however, rests upon an erroneous premise. The limitation period for assessment is "five years after the return was filed." Not

until the return has been filed does the statute begin to run. In many cases, no doubt, as in the Updike case *supra*, the period of assessment has been extended by the failure to file the return at the proper time.

There is another class of cases where the power to assess for 1915 and earlier years was in force at the date of the passage of the Revenue Act of 1921, viz., those in which proper waivers had been filed seasonably.

We infer that these two classes of cases were regarded by Congress as sufficiently large to justify the application to 1915 and earlier years of the general provisions of Section 250(*d*) of the 1921 Act.

(*b*) In our original brief we alluded to the material difference between the present case, involving a statutory liability, and the case of two citizens, *sui juris*, wherein private rights only were involved. We take the liberty of referring again to this subject.

Section 1106 of the Revenue Act of 1926 (44 Stats. 9-55) provided in part:

> "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability * * *."

This section was repealed as of the date of its enactment, by Section 612 of the Revenue Act of 1928. In the case of the Peerless Woolen Mills Company, 13 B. T. A. 1119, the Board of Tax Appeals held that a waiver given after the bar of the statute was effective, was invalid if given while Section 1106 of the

Revenue Act of 1926 was in force. The basis of this ruling was, "that at the time the waiver in question was filed the remedy was not only barred but also the liability was extinguished * * *." This decision was promulgated on October 17, 1928, and, therefore, after the repeal of Section 1106 of the 1926 Act, by Section 612 of the 1928 Act.

Our view is that not only is this ruling sound, but that it applies also to waivers given before the enactment of the 1926 Act, such as we have here.

The contrary view, as stated in the brief for respondent, page 9, seems to be based upon the doctrine of Campbell *v.* Holt, 115 U. S. 620 and related cases. These authorities are distinguished from those we believe to be applicable here in the cases we will cite presently.

Taxes are liabilities created by statute. In the absence of a taxing statute, there is no liability. Moreover, the length, breadth, and thickness of the liability are to be measured by the statute.

These exactions differ essentially from debts or other contractual obligations resting upon some act or omission of the party to be charged. Nothing that the taxpayer may do or fail to do—the material facts having occurred—can affect the liability for taxes.

It should also be noted here that the statute defining the limitation period (Section 250(*d*) of the 1921 Act) refers directly to the act creating the liability, the Revenue Act of 1913. Under the authorities, the effect of this direct reference is the same as if the limitation provision was contained in the same act that created the liability. The question with which we are dealing here,

it will be recalled, is whether the bar of the statute affects not only the remedy but also the liability itself in cases where taxes are involved, they being liabilities created by statute.

The case of The Harrisburg, 119 U. S. 199, involved the right of the widow to sue for damages for wrongful death of her husband, after the expiration of one year, the limitation provision specified in the statute. The liability, if any existed, was a creation of the statute. The widow relied upon the fact that no such limitation period existed at admiralty law. This Court, however, held that the right of the widow to sue came from the statute and that the period of limitation must be taken therefrom. In the course of the opinion the Court said:

> "The statutes created a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

In Davis *v.* Mills, 194 U. S. 450, it appeared that the action had been instituted within the period fixed by the state statute creating the liability but after the period specified in an amendment of the statute. The

rule in which we are interested was stated by the Court in this language:

> "It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

In William Danzer & Company *v.* Gulf Railroad Company, 268 U. S. 633, it was held that where the period for presenting a claim against the carrier to the Interstate Commerce Commission had expired before the presentation of the claim, the provision of the Trans-

portation Act of 1920 that the period of Federal control should not be computed as a part of the limitation period, did not apply. Distinguishing cases of statutory liability from those involving contractual obligations only, the Court held:

> "We need not re-examine the doctrine of Campbell *v.* Holt, 115 U. S. 620, 20 L. ed. 483, 6 Sup. Ct. Rep. 209, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations, the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained, and that such repeal did not deprive the debtor of his property without due process of law, in violation of the 14th Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the Statute of Limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act (The Harrisburg, 119 U. S. 199, 214, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140), and those arising under

> the Federal Employers' Liability Act (April 22, 1908) chap. 149, 35 Stat. at L. 65, Comp. Stat. Sec. 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208; Central Vermont R. Co. *v.* White, 238 U. S. 507, 511, 59 L. ed. 1433, 1436, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; Atlantic Coast Line R. Co. *v.* Burnette, 239 U. S. 199, 201, 60 L. ed. 226, 227, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144; Kannellos *v.* Great Northern R. Co., 151 Minn. 157, 160, 186, N. W. 389; Jones *v.* Delaware, L. & W. R. Co., 96 N. J. L. 197, 114 Atl. 331. See also Davis *v.* Mills, 194 U. S. 451, 454, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692. This case belongs to the latter class. Section 206(*f*) will not be construed retroactively to create liability. To give it that effect would be to deprive defendant of its property without due process of law, in contravention of the 5th Amendment."

The rule enunciated in these cases has been applied to the liability for income taxes. In Bashara *v.* Hopkins, 290 Fed. 592 (U. S. D. C. Texas), in so applying the rule, the Court said:

> "It is claimed that, if the plaintiff should pay the tax demanded and avail himself of the statutory provisions for refund, he would be denied recovery, even though able to show the proceeding for collection was begun after the expiration of five years, because the defense of limitation, when presented as a basis for recovery, would be denied; in other words, that limitation will avail him as a defensive pleading (and as an affirmative one in this case) but that it would not be available to him in a refund suit. It can-

not be assumed that the government would be deaf to the bar of limitation and the consequent illegality of an assessment or collection after such bar. In Meriwether *v.* Garrett, 102 U. S. 501, 26 L. Ed. 197, Chief Justice Waite said:

"'The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the Legislature.'

"In The Harrisburg, 119 U. S. 214, 7 Sup. Ct. 147, 30 L. Ed. 358, it was said:

"'The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation on the liability itself as created, and not on the remedy alone. It is a condition attached to the right to sue at all.'

"At page 1052, 25 Cyc. it is stated that the liability created by statute is a specialty and governed by limitations applying to specialties. In the case of Smythe *v.* New Providence Tp. (D. C.), 253 Fed. 824, the rule is stated that general statutes of limitation do not apply on liability created by statute, and it is reasoned that such liability is not a debt which has arisen under a contract, either express or implied, but is an obligation which is a creation of the statute.

"In the case of Phillips *v.* Grand Trunk Railway, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, where the Supreme Court had under consideration the rights of the shippers to recover from the carrier freight charges held to have been unreasonable by the Interstate Commerce Commission and the provisions of the Hepburn

> Act (Comp. St. Sec. 8563 *et seq.*) limiting the time within which claims of that nature can be asserted, it was held that the lapse of time, not only bars the remedy, but destroys the right. See, also, page 708, 37 Cyc.; Davis *v.* Mills, 194 U. S. 451, 24 Sup. Ct. 692, 48 L. Ed. 1067; Northern Pacific Railway *v.* Crowell (D. C.) 245 Fed. 668."

Upon these authorities, we reach the conclusion that, without regard to Section 1106 of the Revenue Act of 1926 (which is admittedly without application here) or its repeal, the bar of the statute of limitations in the present case not only affected the remedy but also extinguished the liability itself. If this conclusion be sound, under the rule expressed in the Peerless Woolen Mills case, 13 B. T. A. 1119, the waiver was ineffective to revive the statutory liability for income taxes of 1914.

All of which is respectfully submitted.

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